

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE,	:	
COUNTY AND MUNICIPAL EMPLOYEES,	:	
COUNCIL 81, LOCAL 218,	:	
	:	
Charging Party,	:	
	:	<u>ULP No. 07-05-570</u>
v.	:	
	:	
BRANDYWINE SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

BACKGROUND

The Brandywine School District ("District") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

The American Federation of State, County and Municipal Employees, Council 81, Local 218 ("AFSCME") is the exclusive representative of certain employees of the District for purposes of collective bargaining pursuant to section 1302(j) of the PERA.

AFSCME and the District were parties to a collective bargaining agreement ("CBA") with an expiration date of June 30, 2006. Contract negotiations failed to produce a successor Agreement and by operation of Article 18.4 in the collective

bargaining agreement, the Agreement was automatically extended beyond its original expiration date.¹

On or about July 18, 2006, the District notified AFSCME of its intent to terminate the negotiated Agreement sixty days hence. In its letter of July 18, 2006, the District identified various sections in the Agreement which, in its opinion, were not mandatory subjects of bargaining and which the District would not, therefore continue to recognize. Included in the list were Sections 9.2.4 and 9.2.5, which provide:

9.2.4 Where because of Operational necessity, permanent transfers are required, and such transfers are involuntary, the least senior qualified Employee within a given job site or job classification will be transferred except where it is necessary to satisfy the requirements of law, affirmative action programs, a person other than the least senior qualified person may be involuntarily transferred. Permanent transfers will not be made for arbitrary or capricious reasons. The Employee being transferred may bump a less senior Employee in the same job classification. If that occurs, the Employee may bump another Employee less senior and so forth until the position is filled.

9.2.5 Employees may be temporarily transferred to meet operation requirements of the District. When such temporary transfers are involuntary, such assignment shall not exceed sixty calendar days, after which the Employee shall be returned to the original position.

On or about May 10, 2007, AFSCME filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by the District in violation of Section 1307(a)(5) of the PERA, which provides:

§1307(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

¹ Article 18.4: This Agreement shall continue in effect until replaced by a successor Agreement, or until it is terminated by either party giving written notice of desire to terminate to the other party. In the event of notice to terminate, such notice shall be given to the other party in writing by certified mail sixty days prior to the date said party desires termination of the Agreement.

- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

The substantive allegation contained in the charge alleges that on January 19, 2007, AFSCME filed a Level I grievance alleging violations of Sections 9.2.4 and 9.2.5 of the collective bargaining agreement.

On January 29, 2007, the District denied the grievance filed on January 19, 2007 for the reasons that it was untimely filed and that sections 9.2.4 and 9.2.5 constitute non-mandatory subjects of bargaining which expired with the termination of the Agreement effective September 16, 2006.

On March 1, 2007, the grievance was appealed to Level II where it was again denied for the same reasons.

The District filed its Answer to the unfair labor practice charge on or about May 21, 2007, essentially denying that it had violated any of its statutory obligations under Title 19, Chapter 13, of the Delaware Code.

On June 15, 2007, PERB issued a Determination of Probable Cause to believe that an unfair labor practice may have occurred. Finding no material dispute of the underlying facts, PERB directed the parties to submit simultaneous argument addressing whether sections 9.2.4 and 9.2.5 of the terminated collective agreement involve mandatory subjects of bargaining. The requested argument was received on July 23, 2007. The following discussion and decision result from the record thus compiled.

ISSUE

Whether sections 9.2.4 and 9.2.5 of the parties' expired collective bargaining agreement constitute a term and condition of employment which is a mandatory subject of bargaining not subject to unilateral change?

PRINCIPAL POSITIONS OF THE PARTIES

AFSCME: AFSCME argues that the case of Appoquinimink Ed. Assn. DSEA/NEA v. Appoquinimink Bd. of Ed., Del PERB, ULP No. 1-3-84-3-2A, I PERB 35 (1994), controls the disposition of the current matter.² In Appoquinimink, the PERB determined that the contractual voluntary and involuntary transfer provisions constituted mandatory subjects of bargaining. After comparing the relevant contract language in Appoquinimink with that in the expired Agreement in the Brandywine School District, AFSCME concluded that sections 9.2.4 and 9.2.5 in the Brandywine collective bargaining agreement are mandatory subjects of bargaining which cannot be unilaterally changed by the District.

District: The District first argues that 19 Del.C.§1308(a) requires that an unfair labor practice must be filed within 180 days of the alleged unfair labor practice.

AFSCME first became aware of the District's position concerning the bargaining status of sections 9.2.4 and 9.2.5, of the collective bargaining agreement, on July 18, 2006, when the District provided AFSCME with written notice of its intent to terminate the Agreement and its position regarding Sections 9.2.4 and 9.2.5, therein. The unfair labor practice charge was not filed with the PERB until May 10, 2007, well beyond the 180 day filing period. Consequently, the charge is untimely and must be dismissed.

² Corrected citation.

The District maintains that determining whether a subject constitutes a mandatory subject of bargaining is controlled by the four-part test set forth in Woodbridge Ed. Ass’n. v. Bd. of Ed., Del. PERB, ULP No. 90-02-048, I PERB 537, 545 (1990).

The first step in the Woodbridge analysis is to determine whether the subject matter at issue is expressly reserved to the public employer, as provided for in Section 1302(t) of the PERA, which provides:

“Terms and conditions of employment” means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that such terms shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

The District cites the text entitled Human Resources Management, 6th Ed., Milkovich & Boudreau, for the proposition that “the process of transferring an employee constitutes a staffing decision by an employer.” It also argues that Section 1305 of Title 19, Delaware Department of Education (DOE) Regulations 14 Admin.C. §729.1 and §729.2, and Article 6.2 of the collective bargaining agreement reserve to the District the exclusive prerogative to assign its custodial staff as it sees fit. For this reason, staffing decisions are not mandatory subjects of bargaining.

Step 2 of the Woodbridge test is to determine whether the subject matter falls within the statutory definition of “terms and conditions of employment” as defined in Section 1302(t), of the PERA.

Step 3 of the Woodbridge test involves determining whether the subject matter involves a matter of inherent managerial policy as set forth in section 1305, of the PERA, which provides:

A public employer is not required to engage in collective

bargaining on matters of inherent managerial policy, which include but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure, and staffing levels and the selection and direction of personnel.

The District contends that after applying part 2 and part 3 of the Woodbridge test, sections 9.2.4 and 9.2.5 of the terminated collective bargaining agreement cannot be mandatory subjects of bargaining. Citing Section 1305, of the PERA, and AFSCME, Council 81, Local 1007 v. Delaware State University, Del.PERB, ULP No. 01-06-320, IV PERB 2559 (2002), the District argues that “any provision addressing staffing does not contain a mandatory subject of bargaining.”

Alternatively, if it is determined that staffing issues involve both a term and condition of employment under Section 1302(t) of the PERA and an inherent managerial prerogative under Section 1305 of the PERA, the final step in the Woodbridge analysis is a balancing test to determine whether the subject matter is a mandatory or permissive subject of bargaining under section 1302 or section 1305, respectively.

The District argues that the balancing test does not apply in the current matter. First, the staffing provisions addressed in the Appoquinimink decision were limited to filling vacancies based on seniority. Here, there are many options available to the District for filling vacancies such as not filling the vacancy, filling it with existing staff or hiring from the outside. Further, there are many reasons why the District might need to reassign employees, i.e., discipline; special needs of a particular building; employee conflicts; conflict of interest concerns; short-term projects; and, filling vacancies.

Second, it is not clear from the Appoquinimink opinion whether the decision turned upon a finding that filling vacancies was a term and condition of employment or a

finding that it was a procedural process. The District here argues that seniority and bumping rights are substantive rather than procedural and, therefore, are not mandatory subjects of bargaining.

Third, the Appoquinimink decision was issued before the PERB held that staffing decisions are a fundamental right of management. AFSCME 1007 v. DSU (Supra.)

Fourth, the Appoquinimink decision is governed by Title 14 Chapter 40 rather than Title 19 Chapter 13 of the Delaware Code. The definitions of terms and conditions of employment and employer's rights differ between the two statutes.

DISCUSSION

The District's position that the unfair labor practice charge is untimely filed is unpersuasive. The District's letter of July 18, 2006, conveys its intent to terminate the existing collective bargaining agreement effective September 16, 2006, and its position that Sections 9.2.4 and 9.2.5 of that collective bargaining agreement are non-mandatory subjects of bargaining which will therefore expire with the contract's termination.

No response to the District's letter was forthcoming from the Union, at that time. On or about January 16, 2007, an incident involving a transfer occurred resulting in the filing of at least one (1) grievance. The remedy requested was that sections 9.2.4 and 9.2.5 of the contract be applied to the transfer in question. The District responded that the grievance was untimely having not been filed within ten (10) days of the July 18, 2006 letter as required by Article 4.2.1 of the collective bargaining agreement and that sections 9.2.4 and 9.2.5 of the collective bargaining agreement ceased to exist as of September 30, 2006.

The Union filed the instant unfair labor practice charge on May 10, 2007. The District answered claiming the unfair labor practice charge was untimely because it was not filed within 180 days following the July 18, 2006 letter, as required by Section 1308, of the PERA.³

In support of its position, the District cited the case of FOP Lodge 1 v. City of Wilmington, Del.PERB, ULP No. 03-10-408, V PERB 3057, (2004) in which the City failed to pay a bonus to its Police Captains and Inspectors for fiscal year 2000. A grievance was filed by the FOP on October 2, 2002. On October 7, 2002, the City responded to the grievance informing the FOP that it considered the bonus program provision in the contract “specific as to the time periods for this program and its payments” and, by its terms, was no longer in effect. In the Wilmington FOP case, the unfair labor practice charge was not filed until October 15, 2003, more than one year after the City refused to pay the bonus. The charge was, therefore, dismissed because it was untimely.

In the current matter, the District’s letter dated July 18, 2006, was a statement of its position. No follow-up action based on the District’s stated position occurred until approximately January 16, 2007. The parties were involved in contract negotiations and mediation during this time period, which created an environment conducive to the settlement of any issues concerning sections 9.2.4 and 9.2.5, and perhaps an expectation by both parties that the issue would be resolved prior to these sections coming into issue. Unfortunately, that did not occur.

³ Section 1308: . . . no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.

The holding in the Wilmington FOP case is applicable to the underlying facts present in the current matter. In the Wilmington FOP case, there was an action by the City, i.e., refusing to pay the bonus to Captains and Inspectors and a resulting grievance. The City responded to the grievance by reminding the FOP that the contractual bonus plan was no longer in effect. The FOP, although on notice, did not file an unfair labor practice charge until more than a year later. In the present case, the District's action resulted in an adverse impact upon the affected employees in January, 2007. The unfair labor practice charge was filed within the 180 day filing period following the District's action and denial of the resulting grievance. For this reason, the unfair labor practice charge filed by AFSCME on or about May 10, 2007, is timely consistent with the decision in Wilmington FOP.⁴

Concerning the underlying substantive issue, the District's application of the Woodbridge balancing test is also flawed. Statutory prohibitions upon the duty-to-bargain must be "explicit and definitive." Appoquinimink Ed. Assn. (Supra.) Nowhere are staffing decisions reserved to the exclusive prerogative of the public school employer so as to remove them from the duty to bargain mandated by section 1302(t) of the PERA.

Section 1305 of the PERA reserves to the public employer only the right to determine "staffing levels". The term "staffing levels" involves the number and mix of positions necessary to accomplish the District's mission. Consequently, only the number and mix of positions constitute an inherent managerial prerogative which need not be bargained.

Concerning the Regulations of the Department of Education, the District argues:

⁴ The resolution of the question of whether the grievance dated January 16, 2007 was timely filed, is within the exclusive jurisdiction of the arbitrator provided for in Article 4 of the expired collective bargaining agreement.

By regulation, DOE establishes the number of custodians for each district by determining how many custodians are necessary to maintain a particular building. See, 14 Admin. C. §792.2. The custodial positions generated by each Building however, “may be assigned to the various locations [in a district] at the discretion of the local school board or the chief school officer.” 14 Admin. C. §792.1.

The mandate of 14 Admin. C. 792.2 is consistent with the foregoing discussion concerning the scope of the phrase “staffing levels” as it appears in 19 Del.C. §1305. Should it be determined that sections 9.2.4 and 9.2.5 qualify as mandatory subjects of bargaining under the PERA, such a determination would not conflict with 14 Admin. C. 729.1 which confers discretionary authority providing only that individual building assignment of positions to individual buildings “may” be made by the local school board or the chief school officer.

The District’s reliance on Section 6.2 of the collective bargaining agreement, Board Rights, to support its position that staffing decisions are not mandatory subjects of bargaining is likewise misplaced. The interaction of negotiated provisions in a collective bargaining agreement are properly resolved through the contractual grievance and arbitration procedure. Section 6.2.1.3 is immaterial to a determination of whether the District had a duty to bargain.

The District lumps step 2 and step 3 of the Woodbridge test together and, with little substantive discussion, concludes that all staffing decisions are a matter of inherent managerial policy pursuant to section 1305 of the PERA rather than a term and condition of employment pursuant to section 1302(t) of the PERA. In support of its position, the District cites the case of AFSCME, Council 81, Local 1007 v. Delaware State University,

Del.PERB, ULP No. 01-06-320, IV PERB 2559 (2002). The District construes the Delaware State University decision too broadly.

The Delaware State University case involved a decision by the University to reduce the hours worked by the Assistant Resident Managers and the Night Desk Staff from twelve months to ten months. The limited issue thus involved the staffing level or, stated otherwise, the number of positions required in order for the University to effectively accomplish its role in providing effective and efficient university housing.

The term “staffing levels” is clear and unambiguous on its face and does not, extend beyond the determination of the number and mix of positions which, in the judgment of the public employer, is optimally required to accomplish the employer’s mission. It certainly does not reserve nor address the assignment of employees to designated positions as being within the unilateral control of the employer, as the District contends.

Because of the limited scope of the term “staffing levels” as it is used in 19 Del.C. §1305, the method or procedures for accomplishing the internal transfer of employees, be it voluntary or involuntary, does not constitute an inherent managerial policy under Section 1305 of the PERA.

Any misperception concerning the scope of the Delaware State University decision (Supra.) most likely results from the following dicta in that decision:

Staffing constitutes a fundamental and far-reaching right of management which touches not only the employer’s financial and budgetary considerations but also the efficient utilization of its employees. In the absence of any reference to staffing in Section 1302 (q), staffing decisions do not constitute a term and condition of employment about which the University was required to bargain but rather remain a matter of inherent managerial policy to be bargained at the

University's discretion.

Sections 9.2.4 and 9.2.5 in the expired Brandywine collective bargaining agreement involve the method or procedure for assigning personnel to positions once the District decided to adjust the staffing levels. The PERB has determined that similar provisions constituted mandatory subjects of bargaining. Appoquinimink Ed. Assn. (Supra.) Sections 9.2.4 and 9.2.5 of the Brandywine contract likewise establish the procedures for adjusting the workforce, through mechanisms such as the transfer of employees.

In Appoquinimink, the PERB adopted the following balancing test as the final step in determining which is the proper classification:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions, and also involved areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the operation of the school system as a whole. If its probable effect on the operation of the school system as a whole clearly outweighs the direct impact on the interest of the teachers, it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable.

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The following comments are provided as guidelines in applying the balancing test. Once established that a given proposal touches a term and condition of employment, it must also be determined whether or not a proposal also touches upon an inherent managerial policy. If so, in order to reduce the level of negotiability from mandatory to permissive, the impact on the school system as a whole must clearly outweigh its direct impact on the individual teacher. Generally, where the subject matter of a given proposal relates to substance or the establishment of criteria for the ultimate decision, it tends toward permissive,

as infringing upon the decision-making authority of the employer. Where the subject matter of a proposal relates primarily to matters of procedure or communication, it tends toward being mandatory. However, in determining what constitutes inherent managerial policy, impact is an equally important factor.

The decision in the Appoquinimink decision (Supra.), was controlled by Public School Employment Relations Act (“PSERA”), 14 Del.C. Ch. 40. Section 4005, School employer rights, which does not include the term “staffing levels.” The Appoquinimink decision (Supra.), holding that the procedures for transferring employees constituted a mandatory subject of bargaining resulted from the application of the balancing test.

The decision in this matter, however, does not require reliance on the balancing test. Staffing decisions unrelated to the number or mix of positions are mandatory subjects of bargaining. Regardless, applying the balancing test in this matter would render the same result as the decision in Appoquinimink (Supra.). The school district alone determines the requisite experience and qualifications required of its employees. All employees must remain qualified to perform their assigned duties. If an employee is not performing satisfactorily, appropriate corrective action can be initiated by the District. Thus, when and where an employee works should matter little to the District. A qualified employee is a qualified employee and in the normal course of events his or her assignment has little impact on the school district, as a whole.

On the other hand, the direct impact upon the individual employees can be significant. Child care arrangements may be affected. Most families today have more than one income earner and the impact of their work scheduling, requisite travel arrangements and coordination of personal family activities and responsibilities may be significant, especially where children are involved. The direct impact upon an individual

employee of a transfer or change in a building assignment far outweighs the impact upon the school district, as a whole.

While the District's arguments concerning why it must retain the right to unilaterally select employees for transfer may be germane to a specific proposal at the bargaining table, they are not a valid justification for the District's position that no staffing decisions are mandatorily negotiable under the PERA.

DECISION

Consistent with the foregoing discussion, it is determined that by unilaterally altering the status quo of a mandatory subject of a term and condition of employment, namely temporary, permanent and involuntary transfer procedures, without first bargaining with AFSCME, the District violated 19 Del.C. Section 1307 (a)(5), as alleged.

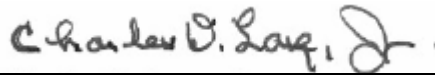
WHEREFORE, the District is hereby ordered to:

1. Reinstate the status quo as it relates to the application of Sections 9.2.4 and 9.2.5, of the collective bargaining agreement. This remedy shall be retroactive to the termination of the collective bargaining agreement on or about September 16, 2006, and shall continue until modified by either the agreement of the parties or by a binding interest arbitration award.
2. Return to the collective bargaining process with AFSCME Local 218 and schedule and participate in the third mediation session with a good-faith intent to resolve all outstanding issues.

3. Post copies of the Notice of Determination in all locations where notices affecting bargaining unit employees are normally posted, including the workplaces and the District's administrative offices. The Notice must remain posted for thirty (30) days.

IT IS SO ORDERED.

Dated: September 21, 2007

A handwritten signature in dark ink, reading "Charles D. Long, Jr.", is positioned above a horizontal line.

Charles D. Long, Jr.,
Executive Director,
Delaware PERB